(20,574.)

Supreme Court of the United States.

OCTOBER TERM, 1907.

The Kansas City Northwestern Railroad Company, Appellant. VS. Frederick Zimmerman, as Administrator of the estate of L. Zimmerman, deceased; E. A. Kelly, Administrator *de bonus non* of the estate of L. Zimmerman, substituted for Frederick Zimmerman, Administrator Appellee.	No. 231

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The facts upon which this suit rest, briefly stated, are as follows:

L. Zimmerman, in his lifetime, was the owner of certain lots in the City of Leavenworth; some of the lots owned by him were on the west side and

some on the east side of Second street, a duly and lawfully established street in said city, with an established grade, running north and south through said city and which street had been duly opened as well as established for many years and was and is one of the principal thoroughfares of said city.

In May, 1887, The Kansas City, Wyandotte and Northwestern Railroad Company constructed and built a railroad in a northeasterly direction through the City of Leavenworth, until it came to the south line of Zimmerman's property, and then, without any right or authority from him and without condemning the same, it appropriated a part of his property and constructed its road between said lots across and over that part of Second street immediately in front of said lots, and raised and made a high embankment of a permanent nature the whole width of said Second street and placed iron rails thereon and thereby changed the established grade of said street (as long prior thereto established by the City of Leavenworth) to a height of three feet immediately in front of said lots, and from that time on continued to operate engines, cars and trains daily thereon and seriously and permanently impair egress and ingress thereto and therefrom. (See findings of fact R. 53)

In February, 1889, Zimmerman instituted suit against the Kansas City, Wyandotte and Northwestern Railroad Company in the District Court of Leavenworth County, Kansas, to recover damages for the appropriation of the right-of-way as aforesaid.

In May, 1897, he recovered a judgment for $3000.00 with interest thereon from date until paid at the rate of six per cent per annum and his costs; shortly after recovering said judgment said L. Zimmerman died and Frederick Zimmerman, his son, was appointed administrator of his estate and the action and judgment was revived in his name.

Subsequent to the taking of L. Zimmerman's land, as aforesaid, the railroad company gave a mortgage on all its railroad property, rights and franchises to The Farmers Loan and Trust Company of New York to secure certain bonds issued by said Kansas City, Wyandotte and Northwestern Railroad Company; default was made in the payment of said bonds or some interest thereon and suit in foreclosure was instituted in the Circuit Court of the United States for the District of Kansas, First Division and in January, 1893, a decree was entered against said company foreclosing said deed of trust and ordering that the property be sold.

Sometime in the year 1894, under said decree, the property was sold to George C. Smith and B. P. Waggener, who were the agents and purchasing trustees for the appellant company herein; and subsequently they made deed conveying the property to said company. B. P. Waggener, one of the purchasing trustees named as aforesaid, was the general counsel for the Kansas City, Wyandotte and Northwestern Railroad Company and was attorney of record in the suit brought by L. Zim-

merman, in his lifetime, against said company to recover damages for the appropriation of his land as aforesaid; and said Waggener had actual knowledge of the pendency of said action.

After the purchase of said road by the trustees and the appellant company as aforesaid it continued to retain possession of the right-of-way and Zimmerman's land seized by The Kansas City, Wyandotte and Northwestern Railroad Company and to operate their engines, trains and cars thereon; and in 1899 Frederick Zimmerman, as said administrator brought his action in the District Court of Leavenworth County, Kansas, against The Kansas City Northwestern Railroad Company, the appellant herein, seeking to have the District Court adjudge that by reason of the taking and retaining possession of the right-of-way appropriated as aforesaid by the old company that they be compelled to pay the judgment obtained by him against the old company or that they be enjoined from using said right-of-way. In said action Zimmerman also alleged that said appellant company was bound to pay his claim on account of the orders of the Federal Court made in The Farmers Loan and Trust Company foreclosure suit.

In due time the appellant company filed its petition and bond for removal and the transcript was filed in the Circuit Court of the United States for the District of Kansas, First Division, on the equity side of said court and in accordance with the equity practice of said court Zimmerman recast his bill. (R. 17 to 28)

In due time the appellant filed its demurrer to said recasted bill. (R. 28–29)

(When Zimmerman brought his action in the District Court of Leavenworth County, Kansas, he made Leavenworth City a co-defendant; after the action was removed to the Circuit Court of the United States for the District of Kansas and after recasting his bill as aforesaid, Zimmerman dismissed his action as to the City of Leavenworth and obtained leave to file an amended bill of complaint, which amended bill is set out in the record at pages 31 to 41.)

The appellant company then filed its demurrer to said bill and subsequently obtained leave and filed its amended demurrer to said bill. R. 42 to 46)

The ground or one of the grounds of the demurrers was that the District Court of Leavenworth County had no jurisdiction of the matter and this being a fact the removal to the Circuit Court of the United States by it did not give said Circuit Court any jurisdiction.

The reasons given by the company in its demurrer for claiming that said courts had no jurisdiction were that the bill of complaint alleged that the company was bound to pay Zimmerman's claim on account of the orders and judgment in The Farmers Loan and Trust Company foreclosure suit. Therefore the bill showed that that court had retained jurisdiction to determine the kind of

claim which Zimmerman claimed to have, and that if Zimmerman was entitled to any relief he must file his petition in intervention in said foreclosure suit.

Zimmerman also filed his motion to remand and thereafter said demurrers and motion came on for hearing and the motion of Zimmerman to remand was overruled and the demurrers filed by the appellant company were sustained. (See opinion and order R. 47 to 48)

Zimmerman then obtained allowance of appeal and filed his transcript of the record in the United States Circuit Court of Appeals for the Eighth Circuit. (R. 61 to 64)

Afterwards said appeal came on for hearing and brief and oral argument was presented by both parties and the Court of Appeals handed down its decision reversing the lower court and directing it to overrule the demurrers to the bills of complaint and for the lower court to proceed with the case in accordance with its views expressed in its opinion. (144 Federal, 622) and mandate (R. 65)

The appellant company took no steps of any kind or character after the decision of the Court of Appeals to have the action of that Court reviewed in this court; so after the expiration of 60 days, in accordance with the rules of said court, the mandate of said Court of Appeals was sent to the lower court.

On the 25th day of June, 1906, said mandate was spread of record and the Circuit Court set aside its order sustaining the demurrers heretofore mentioned and directed that 30 days be given to the defendant to elect as to whether or not it will stand upon its demurrer and have final judgment rendered against it thereon, or whether it will elect to answer, and in the event that it elects to answer, 60 days is given said defendant in which so to do. (R. 50 to 51)

On the 18th day of September, 1906, Zimmerman filed his motion asking the court to render a decree in his favor as prayed for in the bill of complaint and in accordance with the mandate of the Circuit Court of Appeals.

On the 27th day of October, 1906, said motion came on for hearing, the plaintiff being present by Atwood and Hooper, its attorneys, and the defendant by Hon. Frank Doster, its attorney, and thereupon the defendant asked leave of court to refile its demurrers to said amended bill, which was granted, the same, however, to be without prejudice to a hearing at this time on said motion. Said demurrers were refiled and a hearing of said motion was proceeded with and thereupon the court overruled said demurrers and ordered and decreed that the clerk enter an order in the order book that the complainant's bill be taken *pro confesso* as a matter of course. (R. 51 to 52, paragraphs 69–70)

On the 27th day of November, 1906, the decree

was taken herein adjudging that the appellant pay said Zimmerman's claim with interest and costs, etc. (R. 52 to 55)

The appellant company then obtained order allowing appeal (R. 58) and a transcript was filed in this court February 16, 1907.

ARGUMENT.

The decree of the lower court should be affirmed for the reasons set forth in the brief filed herein on the motion to dismiss. It is very apparent from the record that the appellant herein is seeking to have in this case a review of the decision of the Court of Appeals for the Eighth Circuit because there was nothing done by it in the lower court in any way that would justify said court to do anything else than to carry out the mandate of the Court of Appeals. No new grounds of demurrer were filed, no new pleadings, nothing was presented in the lower court by the appellant company that was not presented to the Circuit Court of Appeals, no new fact, no new law point. All it sought to do was simply to obtain leave to refile its demurrers. The demurrers were already filed to the bill, had been passed upon by the Circuit Court of Appeals. The mandate had come down from the Court of Appeals directing the lower court to overrule the demurrers and all that the appellant company did in the lower court, after that, was to ask leave to refile these same demurrers. This raised no new question, obtained for the company no new rights and was done for the

purpose of obtaining a pretext for taking this appeal to this court and thereby obtain delay. The demurrers were on file and to obtain leave to refile them was an idle ceremony; to take a pleading already on file and have the clerk refile it, amounts to nothing. By such a proceeding as this, the appellant company could not have obtained any new or greater rights than it had.

And for the reasons stated in our brief filed herein on the motion to dismiss and here stated, we submit that the decree of the lower court should be affirmed and that a finding should be made by this court that this appeal was taken for no other reason than to cause delay and that it is one of those cases that fall within paragraph 2 of Rule 23 of this court and that the appellant company should be adjudged to pay damages at some rate not exceeding ten per cent, in addition to interest, as provided for in said rule.

II.

If this court should be of the opinion that this appeal should not be dismissed or affirmed for the reasons above indicated, we, on the merits of the cause, respectfully submit that the District Court of Leavenworth County and the Circuit Court of the United States had jurisdiction to hear and determine this cause.

The appellant company contends that the state court was without jurisdiction to entertain the suit which Zimmerman commenced therein for

the reason that the Circuit Court of the United States for the District of Kansas, First Division, in the foreclosure suit of The Farmers Loan and Trust Company against The Kansas City, Wyandotte and Northwestern Railroad Company had retained jurisdiction to determine what claims the purchaser at such sale should pay; and that when a bill filed in any court, other than a bill in intervention in the Farmers Loan and Trust Company suit, alleging that the purchaser at such sale was bound to pay its claim on account of the orders and decrees rendered in the Farmers Loan and Trust Company suit, that that fact showed, that such court was without jurisdiction for the reason that jurisdiction over such matters had been reserved and retained to the Federal Court in the trust company's suit.

Further, that under such circumstances the suit was removable to the Federal Court as it drew in question the construction of a Federal decree, and it was intended, under the constitution and laws of the United States that the Federal Courts should have the right to determine the construction of their own decrees; that said Circuit Court acquired jurisdiction to determine whether the state court had any jurisdiction and if the state court did not have jurisdiction then that said Federal Court did not acquire any in that cause.

We quite agree with the contention of the appellant company that the case was removable for the reason that the construction of a Federal

decree, among other matters, was drawn in question. And under the decisions it was a removable cause. (See *First Natl. Bank* v. *Society for Savings*, 80 Fed., 581; *Zimmerman administrator* v. *Kansas City Northwestern R. R. Co.*, 144 Fed., 622.)

That the state court was without jurisdiction to entertain Zimmerman's demands we deny. Zimmerman's aim was to enforce the payment of a judgment obtained by him against the railroad company for appropriating his land; he was a citizen of Kansas, as was the company he sued; the subject matter was injuries done to his property; he brought his action in the courts of Kansas to enforce his claim and in his petition states that he was entitled to recover against the company not only on account of his legal and equitable rights, but on account of a decree of a Federal Court. Can there be any question but that the state court would have had jurisdiction to determine the rights of Zimmerman as against the defendant company, even if he did allege in his petition that some of his rights as against the defendant company were based upon a decree rendered in a Federal Court? We apprehend not. Many judgments rendered by the state courts have been interpreted and enforced by the Federal Courts and vice versa.

Zimmerman's land had been taken without due process of law; he brought suit against the company who appropriated it to recover its value and his damages sustained by reason thereof; he

obtained a judgment awarding him damages for such taking; he then began to try and enforce payment thereof and found that the company which had taken his land had sold all its property and was execution proof, and that the new company, who had bought the old company's property, had taken possession of his land and continued in the enjoyment thereof; he saw that the wrong that had been done to him by the old company, was being continued by the new company; he knew that the constitution provided, Article 12, Section 4, that,

> "No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall first be made in money, or secured by the deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

He knew that the Supreme Court of his State in the case of *Cohen* v. *Railroad Company*, 34 Kansas, 158, had decided:

> "Where a railroad company has constructed and is operating its railroad through a piece of land belonging to another, without having obtained a right-of-way by any formal condemnation proceedings, and without having procured any title to the land over which it operates its railroad or any easement therein, *the*

> *owner of the land may waive formal condemnation proceedings and all formal modes of transfer, and elected to regard the action of the railroad company as taking the property under the right of eminent domain, and may commence an ordinary action to recover compensation for all the damages which he has sustained by reason of the permanent taking and appropriation of the right-of-way by the railroad company.*"

He knew what every citizen knew; that the Supreme Court of the United States had repeatedly decided what it decided in the case of *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641; L. C. P., Book 34, p. 295:

> "7. Though the land be entered on pending the appeal, the title does not pass, *and the land is not taken, until compensation is actually made to the owner.*"

In a word, he knew that his property could not be taken from him without due process of law. All this being so, what occasion had he to seek the Circuit Court? So far as the record shows, he was absolutely ignorant of the proceedings in that court, and being an unlettered man, he probably was ignorant of them; and whether he was or not, nobody can know, since he is now dead. It cannot be said that he had constructive notice, because the land wasn't embraced in the mortgage and so, wasn't within the jurisdiction of the Circuit Court.

But, assuming that he did know it, what occasion had he to seek that tribunal? He knew the law to be that if a corporation seized his land, without authority, and used it for railroad purposes, he had a right, as decided in *Cohen* v. *Railroad, supra*, to proceed to have his damages awarded, just as though the company had observed its statutory duty in the premises. He knew, too, that they could get no title to the land, until such award of damages was paid; and he knew, too, that whoever succeeded the old company in its wrong-doing, would get no better title than the old company had, which was no title at all; and that if such successor attempted to continue to occupy the land, he could enjoin them from so doing, or compel the appointment of a receiver to collect his payment.

So, after obtaining his judgment against the company who first appropriated his land, and it failing to pay, and having no property upon which execution could be levied, and finding the defendant company in possession of the land, he brought a suit against that company, the successor to the old wrong-doer, and in so doing did what the Code of his State required of him, viz: to state the facts which constituted what he claimed was his cause of action, and to pray for relief. And this relief should be granted him. Upon this point, the Wisconsin courts have spoken as follows:

"While a judgment against a railroad

company for the taking of land on which its road was constructed remained unpaid, a mortgage of the road with all the property and franchises of the company was foreclosed, and the purchasers organized under the statute of a new company, which, with knowledge of the facts, has continued to operate its road over said land. Held, that equity will restrain the company from further maintaining and operating its road over said land, except upon payment of such judgment against the old company.

* * * *

"The facts that the judgment against the old company was obtained two years before the foreclosure sale, and that the road had been operated over the land during that time, and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years, do not constitute a waiver of the owner's right to compensation.

"The right of the land-owner to maintain an action for the equitable relief above stated, being 'founded upon the title to real property,' is limited to twenty years by Sec. 3, Ch. 138, R. S.; and neither Sec. 6 nor Sec. 22 of that chapter has any application.

"Ejectment would lie in plaintiff's favor to recover the land from the railroad company."

Gilman v. *The Sheboygan & Fond du Lac R. R. Co.*, 40 Wisc., 653.

This was but following the established doctrine of that State, for in 18 Wis. 164 the court said:

"The plaintiff's land was appropriated by a railroad company for its roadway, and the damages assessed by the commissioners under its charter, and a judgment for the amount rendered in the plaintiff's favor on the appeal of the circuit court. Before the judgment was paid, the railroad was sold under a mortgage (which covered, among other things, the company's right of way), to persons who organized a new company pursuant to the statute, and continued to operate the road, using the track as laid across plaintiff's land. *Held*, that the plaintiff had a right of action on the judgment, against the new company.

"If the new company had asserted no right to use the plaintiff's land under its purchase, it would not have been liable on the judgment,(*Vilas* v. *M. & P. du Ch. Ry. Co.*, 17 Wis. 497; *Smith* v. *C. & N. W. Ry. Co.*, ante 21.)

"But in taking possession of the land and assertion of a right to use the same, was an election to adopt the original taking and receive the benefit thereof; and subjected it to the conditions under which that right existed in favor of the old company.

"Perhaps the plaintiff might have treated either company as trespasser *ab initio*, if, while using his land, it neglected for an unreasonably long time to pay the damages adjudged to him; but it did not rest with the old company to claim the character of a mere wrong-doer, after proceedings had, to condemn the land; nor with the new to claim that character, after taking and using the land under its purchase."

Pfeifer v. *The Sheboygan & Fond du Lac R. R. Co.*, 18 Wis. 164.

The courts have used the expression "lien" rather loosely. In nearly all, if not quite all, the States, the law is, that title does not pass to land taken under the right of eminent domain, until the land owner has been compensated. Where a title has not been divested, the owner, of course, can hardly be said to hold a lien upon it, as the word "lien" would suggest the absence of title in the lien holder, and the presence of title in somebody else; but though some of the courts have made use of this term, thus inartistically, it is

only too manifest that the thought sought to be thereby expressed, was that where land was taken from a person by eminent domain, that there remained in such land owner the right to compensation, which he could enforce against either the one taking the land, or any successor in interest to the one taking the land; and the case at bar, of course, is a case of the taking under the right of eminent domain; for while there were no statutory condemnation proceedings, yet under the Cohen case in 34 Kansas, from which we have quoted, *supra*, Zimmerman had a right to treat the taking as though by condemnation, and sue for his damages, which he did.

The Supreme Court of Massachusetts has aptly expressed the principle involved on page 576, of Vol. 127 of the Massachusetts Reporter, (*Drury* v. *Midland R. R. Co.*) when it said: "The power to *take* and the obligation to *indemnify* for the taking are *inseparable*. They are parts of one transaction." And the Supreme Court then cites in support of the proposition: *Haverhill Bridge* v. *County Commissioner*, 103 Mass. 120; *Connecticut River Railroad* v. *County Commissioners*, 127 Mass. 50. This last case was a case where an act was declared unconstitutional which provided for the taking of land for depot purposes by a railroad owned by the Commonwealth of Massachusetts, and providing that the land should be paid for from the earnings of the road. But of course, authorities are hardly necessary upon this general

principle. The case of *Drury* v. *Midland R. R. Co.*, just cited, was one where there was a shift of the ownership after the taking, as in this case. The syllabus is as follows:

> "By the law of this Commonwealth, a person, whose land is taken by a railroad corporation under the right of eminent domain, has a right to compensation, which, if not strictly a lien, is at least in the nature of a lien or incumbrance upon the land; and this right may be enforced against a corporation which is the successor of the corporation taking the land.
>
> "A railroad corporation took a parcel of land under the right of eminent domain. Subsequently it mortgaged its property to trustees to secure bonds to a certain amount, which stated that 'the mortgage was the first and only lien on the property and franchises of the company, when the existing mortgage debt is retired.' The making of this mortgage was ratified by the Legislature. The mortgage was afterwards foreclosed, and the bondholders formed a new corporation; and their acts in so doing were confirmed by the Legislature, and the new corporation was vested with all the franchises, powers and privileges of the old corporation, and

made subject to all the restrictions, duties and liabilities, set forth in the general law relating to railroad corporations, then or thereafter in force. *Held*, that the new corporation might properly be made a party respondent to a petition for damages, originally filed by the person whose land had been taken, against the old corporation, and might be restrained from using or occupying the land, unless the damages were paid or secured to the land-owner."

Drury v. *Midland R. R. Co.*, 127 Mass. 571.

Another case very similar to ours is *Bridgman* v. *St. Johnsbury and Lake Champlain R. R. Co.* This case is reported in several places, 58 Vermont, 198; 23 American and English R. R. Cases, 30; and 2 Atlantic Reporter, 467. The constitution of Vermont seems to provide that where land is taken by eminent domain, the land owner has given him what they call a lien, for his damages; that if the same is not paid within a certain time, the land owner can bring suit to recover the same. This case is authority on two points: First—That the old company, the Kansas City, *Wyandotte* and Northwestern Railroad Company is not a necessary party to this proceeding, and, second, that the judgment is a finality. The syllabi, bearing upon our point, are as follows:

"In a suit in equity to recover land

damages by foreclosure of an equitable lien on land taken by a railroad for railroad purposes, a former company which took the land and to whose rights the defendant company succeeded, is not a necessary party.

"The owner of land taken by a railroad for railroad purposes, has a lien on the land enforcible in equity for his damages; and the lien is not affected by the bringing of a suit against a former company, which took the land, and by obtaining a judgment under the statute—R. L. Sec. 3371; and such judgment is final, as to the amount of damages to be recovered in a proceeding to foreclose the lien against a subsequent company which succeeded to the rights of the first company."

Bridgman v. *St. Johnsbury, Etc., R. R. Co.*, 23 A. & Eng. R. R. Cases, 30; 58 Vt. 198; 2 At. R. 467.

The concluding clause is, as the court will observe, authority upon the proposition that the defendant company in this case is bound by the judgment rendered against the old company.

The Texas Supreme Court, in the case of *Rio Grande & E. P. Ry. Co.*, v. *Ortiz*, 12 S. W. 1129, takes the same position. The syllabus is as follows:

"1. As the Texas statutes require a railroad company to first pay the compensation before appropriating land, one upon whose land a railroad company has entered without condemnation does not lose his lien or title by recovering judgment in a suit for damages, and may recover compensation from the purchaser of the rights of the first.

"2. That in a suit to foreclose the first mortgage bonds of the company, the judgment was rejected by the court as not being a claim to be paid out of the proceeds of the sale, does not preclude the owner from recovering compensation from the purchaser at the sale, who continues to occupy the land.

"3. The amount of a judgment recovered for entering upon land by a railroad company is the proper measure of damages, as against its successor.

"4. The purchaser of a railroad at foreclosure sale, under a decree that the purchaser hold free from all liens and incumbrances, is not an innocent purchaser as against one whose land has been appropriated without condemnation or compensation."

This is also an authority upon the two points, that the defendant company is liable, and that the

old judgment is the measure of its liability. This case is like the one at bar, the taking of the land being by seizure, without any process at law. Under the Texas law, the railroad had no right to take land unless "it first paid a just compensation to the owner," and the Supreme Court speaks of the land-owner's claim in that case as a lien, again illustrating the loose use of that term. This case is also authority upon the point that the argument of the railroad company in this case was not sound when it contended that we should have presented our claim to the federal court; for in this Texas case, the land-owner presented his claim to the federal court, but the same was rejected upon the ground that such damages could not be paid out of the funds resulting from the foreclosure sale, for the reason that, since the land had never been paid for, the title still remained in the land-owner. This whole case is very interesting and well worth reading.

Very many of the cases which are authority upon the point that the company, which is successor to the company taking the land, is liable to the land-owner, are also authority upon the other proposition, that the successor company is bound by the judgment rendered against the old company. To avoid a repetition of citations we will treat these propositions separately.

PURCHASING COMPANY MUST PAY IF IT TAKES THE LAND.

The Pennsylvania doctrine is found in the leading case of *Railroad* v. *Johnson*, 59 Pa. St. 290. In that case, the land was taken by the Northwestern Railroad Company. Under mortgage, all the company's rights and property were conveyed to the Western Pennsylvania Railroad Company. An act of the Pennsylvania Assembly made all claims of the old road liens on the new, but in determining the case, the court said, after speaking of the statute:

> "But the case rests upon other grounds. The plaintiff, who has never parted with his rights, stands on the higher fundamental right of property—that it shall be taken and used by *no* one for the public purpose of a railroad without just compensation being made to him. *Navigation Co.* v. *Coons*, 6 Watts & S. 114; Yost's Report, 17 Pa. St. 524; *Borough of Harrisburg* v. *Crangle*, 3 Watts & S. 460. *This is a sacred constitutional right, not to be spirited away by refinement.* If, therefore, the original occupant has so managed its card as to escape payment until it has divested itself of its interest by any form of alienation, its alienee, mediate or immediate, if it would enjoy the uncompensated right, must pay the price of it, unless it can show an equity

growing out of the conduct of the owner of the soil which would estop him. It must not be forgotten we are treating of a case where the owner has done nothing to divest his right by his own act or alienation, but where the alienee of the original actor stands upon a seizure at law, which must be shown to have conformed to the law in all its steps in order to deprive the owner of his title. * * * This, we have seen, is not a mere lien; the judgment in the process of assessment not being the source of his right, but the means only of ascertaining the amount of his claim and of enforcing its payment. It could be extinguished only by payment or release. When the alienees of the Northwestern Railroad Company came into possession, therefore, under their purchase (if at all), they took the interest acquired *cum onere*. If possession never had been obtained, then clearly they could get it only by payment or security. In law and equity neither they, nor anyone claiming the interest of the Northwestern Railroad by an act of eminent domain, subordinated by the law and the constitution to payment as the condition of its exercise, can hold and use the interests thus acquired without compensation. *Borough of Harrisburg* v. *Crangle*, 3 Watts & S. 460."
R. R. v. *Johnson*, 59 Pa. St. 295.

The Supreme Court of Arkansas, in the case of *Organ* v. *Memphis & L. R. R. Co.*, 11 S. W. 96, decides a case similar to ours in the same way. Syllabi 3 and 9 read as follows:

> "Though the owner may have lost his right to an injunction by reason of his laches, equity will enforce his claim to compensation, as it does a vendor's lien, so long as his title has not been divested by adverse possession.
>
> "Where a railroad company appropriates land without authority of law, and without compensation, a company purchasing the former's right and franchises on foreclosure sale acquires no better title than it had, and takes the land subject to the right of the owners to enforce their claims as prescribed by law."

In a word, the Arkansas courts adopt the Pennsylvania doctrine.

In the case of *Lake Erie & W. Ry. Co.* v. *Griffin*, 8 N. E. 451 (Ind.), the same position is taken, and it is decided that not only is the defendant liable, but that it is bound by the judgment rendered. The syllabus reads as follows:

> "1. Where a new railroad corporation, succeeding to the property, rights, and franchises of an older company,

> enters upon land appropriated by its predecessor and continuously uses the same for railroad purposes to the exclusion of the land owner, it will be deemed to have adopted the original appropriation; and the value of the land having been determined in such original proceedings, by the judgment of a court of competent jurisdiction, the new company is, in equity, liable therefor, and it cannot escape such liability by afterwards abandoning the land."

Another Indiana case is *Railroad* v. *Galey*, 39 N. E., 925. The syllabus is as follows:

> "Where a landowner obtains judgment in condemnation proceedings against a railroad company for land appropriated by it for railroad purposes, its successor, which enters on, uses, and occupies the land for the purposes for which it was condemned, is liable to such owner for the amount of such judgment. *Railroad Co.* v. *Hammond*, 32 N. E., 83, 132 Ind. 475, followed."

Other authorities on this proposition are *Levering* v. *Railroad*, 8 Watts & Sargent (Pa. Report), 459, s. c. 20 A. & E. R. R. Cases 378; *Gillison* v. *R. R. Co.*, 7 So. C. 173; and *Stacy* v. *R. R.*, 27 Vt. 39–44–45, s. c. 20 A. & E. R. R. Cases 378.

The same doctrine is found in *Provolt* v. *R. R.* 57, Mo. 256. The syllabus is as follows:

> "Private property cannot be taken even in the exercise of eminent domain, without compensation to the owner; and before the title can be absolutely vested by virtue of proceedings for condemnation, *payment becomes indespensably necessary.* But where a railroad company commences proceedings under the statute for condemnation of private property, and the commissioners award a given sum as damages, and the court decrees, that on payment thereof, title shall vest in the company, and the owner files his objections to the award and procures a higher assessment, but does not insist on prepayment as a condition precedent to a surrender of the land, nor attempt to obstruct or in any way impede the progress of the work, and by such acquiescence, induces the company to expend large sums upon the road, he cannot maintain ejectment against the company simply on the ground of such failure of prepayment. In the case supposed, of course the strict title will not pass to the company till the paying of the damages awarded.
>
> "*The owner will, however, have other and sufficient remedies, e. g., a court of equity would unquestionably interfere, if neces-*

> *sary, and place the road in the hands of a receiver until the damages are paid from the earnings of the road.*"

The Iowa courts hold in the same way:

> "2. A railroad company which enters upon land and appropriates a right of way without proceedings to condemn, or contract with the owner, or rendering him compensation therefor, is a mere trespasser and acquires no right to hold the land.
>
> "3. A land owner may institute proceedings to recover compensation for a right of way after the railroad is completed.
>
> "4. An injunction will lie to restrain the company from continuing to operate its road, after an award of damages under the statute, until the damages awarded are paid.
>
> "5. In like manner, the lessee of the company constructing and owning the road may be enjoined from operating it until payment of damages legally awarded."
>
> *Hibbs* v. *Railroad*, 39 Iowa, 340.

As we have already stated, the term "lien" is loosely used in several decisions, but whether

called a lien or a right incident to absolute ownership, which last is the more correct expression, the authorities are united upon the proposition that compensation must be paid by, and that the right to compensation can be enforced against, any successor to the taker of the land.

> "The doctrine is that as condemnation is a forced sale, the landowner has a lien on the land for the unpaid purchase money which follows the land even into the hands of a subsequent purchaser of the franchise."
>
> *Sedgwick* v. *Watford, etc., R. R. Co.*, 36 L. J. (Ch.) 379.
>
> *Viner* v. *Hoylake R. R. Co.*, 17 W. R. 92.
>
> "The operation of the road, it is said, may be enjoined until the compensation is paid, especially where the original corporation is insolvent, or a receiver be appointed."
>
> *White* v. *Nashville, etc., R. R. Co.*, 7 Tenn. 518.
>
> *Dayton, etc., R. R. Co.* v. *Lewton*, 20 Ohio. St. 401.
>
> *Pell* v. *Cambrian, etc., R. R. Co.*, L. R. 2 Ch. App. 100.
>
> *Lewes* v. *Combrian R. R. Co.*, 36 L. J. (Ch.) 565.
>
> "In Vermont, besides the principal case, other cases hold that the land-owner has an equitable lien on the land which a court of chancery will enforce."

Kittell v. *R. R. Co.*, 56 Vt. 96; s. c. 20 A. & E. R. R. Cases 165.

Kendall v. *R. R. Co.*, 55 Vt. 438; s. c. 14 A. & E. R. R. Cases 423.

Adams v. *R. R. Co.*, 57 Vt. 240.

"which lien will not be effected by a judgment against the company that owned the road."

Root v. *Lord*, 23 Vt. 568.

Mathews v. *Lucia*, 55 Vt. 308.

Child v. *Allen*, 33 Vt. 476.

Williams v. *R. R.*, 60 Miss. 589; s. c. 20 A. & E. R. R. Cases 378.

Williams v. *R. R. Co.*, 60 Miss. 689; s. c. 20 Am. & Eng. R. R. Cases 378.

"The lien is enforceable against any party who claims under the party that made the entry."

Pierce on Railroads, 167.

Gilman v. *R. R. Co.*, 40 Wis. 653.

R. R. v. *Johnson*, 59 Pa. St. 290.

Drury v. *Midland R. R. Co.*, 127 Mass. 571

And to the point that the judgment against the first company is conclusive as to the amount as against subsequently purchasing companies in privity with the first company, see also

New York, etc., R. R. Co. v. *Stanley*, 34 N. J. Eq. 55.

Pfeifer v. *S. & F. R. R. Co.*, 18 Wis. 155.

Bridgman v. *St. Johnsbury, etc., R. R. Co.*, 23 Am. & Eng. R. R. Cases 35.

As we have already stated, Zimmerman instituted his suit against the company in the Leavenworth District Court. The defendant company removed it, not on the ground of diverse citizenship, but because the case necessitated an interpretation of the decree of the United States Circuit Court.

It doubtless would have been as wise for Zimmerman, at the time he instituted his present suit, to have left out of the petition he filed in the State court, any reference to the federal decree. His cause of action was perfect without it, but he did insert such allegations and probably their presence in the petition, made the removal proper, and gave to the federal court, jurisdiction; but no worse can happen as a consequence of this mistake, if it be so considered, than delay, because the same rules obtain here as in the State courts with reference to such matters. The equities are so strong in Zimmerman's behalf that it is difficult for us to see how the demurrer can be sustained.

Surely the new company can have no higher rights than the old company. If the old company could not convey to the new company a title to the land in question, *directly*, by making a deed to the new company, then surely it could not convey title *indirectly*, by making a mortgage to the Trust Company and having the Trust Company foreclose and a sale made by a master and a deed executed by the direction of the court. All this legal legerdemain could not take from the old company

something that it did *not* possess. Of course, even if the old company had no title to this land, proceedings might have been had by making Zimmerman a party to the foreclosure suit, by which his rights to the land might have been wiped out, but nothing of the kind was done.

Just stop and think for a minute what a monstrous result would follow from adopting the conclusions clamored for by the defendant. They ask the court to say, that in a foreclosure suit, a judge can make an order, saying that everybody, who has a claim of any sort against the defendant company, must come in and present his claim in that court, or be forever barred; and that if a man didn't know of the existence of such a case and had never been served with any summons, nor in any way made a party to such a case, he must, nevertheless, if he did not present his claim (to a court that perhaps he never heard of), be robbed of his remedy; and as a consequence of such a decision, the law would be established to be, that a railroad company can seize a man's land without pretense of right, and while holding him in prolonged litigation give a mortgage *on other property than this land*,—allow the mortgage to be foreclosed,—have its own property sold and get inserted in the decree, that everybody must present their claims to the foreclosing court or be forever barred; and then purchase at the foreclosure sale; and thus get a title to the land without ever having paid a penny for it. And this in the face and eyes of the Constitution,

both State and National, and the multiplied decisions of all courts of last resort, that no man's property can be taken from him, without due process of law, and that the rights of eminent domain cannot be exercised, so as to take one's land without paying for it.

It is no answer to all this to say that he *could* have come into the Circuit Court and have Judge Caldwell award him a remedy. The reply to that suggestion is that he never knew of the decree that gave that privilege; he was neither a party to the suit, in which the decree was rendered, nor a privy to any parties to that suit; and if he had gone there, under the authority of the Texas case, cited, *supra*, he would have been answered that the fund resulting from the foreclosure sale was a fund resulting from the sale of property *covered* by the mortgage; that the mortgage covered *only* the property of the railroad company; that this land had *never* been owned by the railroad company; and that the damage was such a thing as could not be paid out of the proceeds of the sale; and finally, such a decree as to him, was a nullity, because he wasn't a party to that suit.

The Company below talked about priority of lien. There is here no question of priority of liens. The Trust Company never had a lien on this land, and the defendant company has neither lien on, nor title to this land. The Federal Courts have not yet reached the point of selling people's land upon which nobody has a claim. All that Judge

Caldwell could order to be sold, was the property covered by the mortgage, and all that the mortgage could cover, was that which the *mortgagor* owned; and nobody can say that the old company ever owned this land, because it never paid for it, and there is no pretense of a prescriptive title. Hence all that is said in counsel's brief below about priority of liens, are idle utterances. Counsel says in his brief, used below, that such an award as this, is not a personal judgment against the company. We agree to that. The old company would have had the privilege to pay the price or leave the land, and the new company has the same privilege today, if it will restore us to our *statu quo.*

We don't have to discuss what would be the consequence if this was an ordinary judgment for the recovery of money, because it isn't such a judgment. It is just such a judgment as was rendered in the Cohen case in 34 Kansas. It is an award of damages.

A number of authorities were cited by the company in its brief employed in the Circuit Court, and in anticipation of their being presented here, we will answer some of them in advance, but those only upon which the company seemed most to rely.

The case of *Jessup* v. *Wabash Railroad,* 44 Federal 663, was an action arising out of a proceeding against a receiver, and of course, the court appointing the receiver had cognizance of the matter.

The whole argument in defendant's brief, used below, is founded on the misconception that the Trust Company's mortgage gave to the Trust Company a lien on *this* land. We have shown how that cannot be so.

That portion of that brief, in which the company discusses the question as to the judgment binding this defendant when this defendant was not a party to that action in the Leavenworth District Court is exploited in forgetfulness of the fact:

1st: That this company is a privy of the old company, and,

2nd: By taking its property, exercising its franchises and continuing to hold unlawful possession of the land in question, it adopted the acts of the old company and bound itself to the discharge of the obligations resulting from those acts.

See authorities cited above.

The company contended below that on the authority of the Fechheimer case (36 Kansas, 45), that Zimmerman was confined, in the way of remedies, to an injunction suit. The second syllabus of that case is as follows:

> "2. Where a railroad company enters upon land and constructs its road without the consent of the landowner, and without making compensation for the land taken and injured, the owner may pursue any

> one of the several appropriate remedies, and may, where the road is in its nature, design and use, of a permanent character, elect to bring an action for a permanent appropriation and injury, but in such a case it should appear that the verdict and judgment include damages for the entire injury; and it should also clearly appear from the pleadings, or from the evidence, findings and judgment, what interest in the land the owner had parted with, and also what interest has been acquired by the company."
>
> *W. & W. Rld. Co.* v. *Fechheimer*, 36 Kans. 45-46.

In the body of the decisions, Justice Johnson said:

> "The defendant in error was at liberty to choose any one of several appropriate remedies; but if the pleadings only warrant the recovery of compensation for the damages occasioned by the company down to the time of bringing the suit, the judgment would not operate to transfer any title or easement to the company. She now says that she elected to bring her action for a permanent appropriation and injury, and tried the case upon that theory."

And the case was treated as a case of that

character. Now, the several appropriate remedies that lay open to Zimmerman, were at the most four:

1st: An action enjoining them from going upon the land;

2nd: An action of ejectment;

3rd: An action for trespass, *quare clausum fregit*, or

4th: An action such as indicated in *Cohen* v. *Railroad*, 43 Ks. *supra*.

Zimmerman chose to avail himself of the last remedy. As in the Cohen case, his land had been improperly seized; as in the Cohen case, he had a right to waive the trespass, etc., and proceed as though the company had taken the land under the statute, namely: by seeking to have an award of damages rendered in his favor. And this last, he did.

There was no proceeding at common law, by which, when a trespass like this was commited, the wronged landowner could proceed to have an award of damages made in his behalf, which would result in the trespasser acquiring an easement over the land. The most that he could get at common law in the way of money damages, would be that which would measure the damage done to his land by the trespass, down to the time that the suit was instituted, or possibly, down to the time the suit was tried; but in the trial of this case, as in the trial of the Fechheimer case, the

parties recovered for all damage, past, present and prospective.

The Fechheimer case was, by the Supreme Court, sent back for a failure of the trial court to submit certain special questions, and came back to the Supreme Court again, whose second action thereon is reported in 49 Kansas, 643. At page 661, the court says:

> "The railroad company did, as a fact, occupy a portion of the plaintiff's land, * * * This fact gives the plaintiff the right to recover damages as for a permanent taking and appropriation of a portion of her property. She may recover for the depreciation in the value of her property caused by the permanent taking and appropriation of a portion thereof."

Thus, it is clearly seen that one of the "appropriate remedies" mentioned in the first Fechheimer case is a proceeding like that in the Cohen case; and thus, it is also clearly seen that the Fechheimer case in no wise supports this contention of the Company made below, that Zimmerman was confined to a suit for an injunction or an action in ejectment.

Reverting again to the proposition that this company is bound by the judgment against its wrong-doing predecessor, to which wrong-doer, it is a privy in the premises: The authorities already

cited in this brief, establish this proposition; and the reason of things moves with the decisions. The law incident to the power of eminent domain, never intended that a man should be compelled to litigate many times, his right to an award, but only once.

Defendant's position is that because the present company was not a party to the Leavenworth County suit, that they are not bound by that judgment. It must be borne in mind all the while that their only claim of right to possession of this land is as a grantee of the old company through the action of the Circuit Court. There is no pretense that this company ever took steps to acquire title to this land; that it ever bought it or occupied it for the requisite prescriptive period. If they have any right, it comes from the old company through the Circuit Court. Bearing this in mind, the unfairness of the position of the company is made manifest. To hold with them would be saying that a man whose land was taken by the power of eminent domain, or its equivalent, could litigate his claim for an award against the company taking it; and get a judgment; and then if, just as he gets his judgment, the property of the company was sold to another company, he would have to litigate the matter all over again with the new company for the reason, forsooth, that the new company was not a party to the old suit; and just as he had gotten a judgment against this second company, if the road chanced to be sold again, he would have to litigate it a third time with the

third company, and so on *ad infinitum*. And the illustration is not an absurd one, but quite within the possible and probable. This very railroad began life as The Leavenworth & Olathe Railroad and then became The Leavenworth, Wyandotte & Northwestern *Railway* Company and then became The Kansas City, Wyandotte & Northwestern *Railroad* Company and finally the present, The Kansas City Northwestern Railroad Company. No, the law does not impose upon a man, whose land is taken against his will, such a hardship as this, in order to get that which the constitution awards to him, namely: the value of the land so taken.

Under the authority already cited, it is clear that the new company must pay for land or abandon possession of it and restore the *statu quo*, because of the privity existing between it and the wrong-doing predecessor, and because, by adopting and continuing the acts of its predecessor, it assumes the obligations that rested upon its predecessor; and because, being wrongfully in possession of this land, without a title, it must pay what has been once fairly adjudicated to be the proper amount to be paid, in order to entitle them to remain in possession.

And, of course, what is true of one whose land is regularly condemned, is true of one, who has the *right* to proceed against the company in the *same way* that he would have the right to proceed, if his land had been regularly condemned.

If it should be urged that technically there could not be privity in a tort the answer would come that the word privity, as expressive of the relations between these two companies, is as accurate a description of such relations as the word lien used in many of these cases is an accurate description of the lien holder's right in such premises. Strictly speaking, it might be said that there could not be privity in such a case, but the fact remains that whatever claim the succeeding company has, it got from its predecessor. It is occupying the shoes of the wrong-doing company; it is doing exactly what the wrong-doing company did, which occasioned the judgment in question; the judgment was determinative of all the damage done to Zimmerman, both the value of the land taken, the damage done to the land not taken, and the damage done by the occupancy of the street; Zimmerman has litigated the whole question once; his rights in this regard have been judicially fixed and the successor in interest to the company, against whom this judgment is rendered, is bound by it.

THE COMPANY'S USE OF SECOND STREET WAS THE SAME AS TAKING HIS LAND.

While we hardly feel that it is necessary to consider this aspect of the case, since they cannot go behind the judgment, which is the basis of our right, yet since something was said about it in the proceedings in the Circuit Court, we will cite authorities upon it.

"The owners of lots on a city street, the fee of which is in the city, the lots themselves having originally been owned by the city, and conveyed by it with a covenant that the street should continue open forever, are entitled to have the street kept open and continued as a public street for the benefit of their abutting property."

"Such a right of easement is 'property' within the meaning of the constitutional provision requiring compensation for the taking of private property."

"The erection and operation of an elevated railroad,—such as that described in the evidence in this case,—which, as a matter of fact, will to some extent obscure the light of the abutting premises and impair their general usefulness and depreciate their value, was Held incompatible with and destructive of the use of the street as such, and is the taking and appropriating of the property of abutting owners for public use; and also in violation of statutes by which the corporation was bound. (Chap. 606, Laws 1875; chap. 140, Laws of 1850; chap. 697, Laws 1866; chap. 489, Laws 1867.) *People* v. *Kerr*, 27 N. Y. 188; *Kellinger* v. *Forty-Second St. Ry. Co.*, 50 id. 206; *Transportation Co.*, v. *Chicago*, 99 U. S.

635; *Lansing* v. *Smith,* 4 Wend. 21; *Gould* v. *Hudson River R. Co.,* 6 N. Y. 522, explained and distinguished."

Story v. *N. Y. Elevated R. R. Co.,* 90 N. Y. 122.

"Damages, Nature and Measure Of.—But where the wrong is of a permanent nature, and springs from the manner in which the track, as fully completed, affects approach to the lot, then, notwithstanding the right which the state retains to control the manner of use of a highway by a railroad company, even if deemed necessary to compel an entire removal of its track, the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot; and recover, as damages, the consequent depreciation in value of the lot; and in such cases the recovery of damages is a consent on the part of the lot owner to such manner of occupying the street, and concludes both him and any subsequent owner of the property."

The C. B. U. P. R. R. Co. v. *Twine,* 23 Kans. 585.

"Under a state constitution which forbids the taking or damaging of private property for public use without compensation, a railroad company cannot use a street for its track, even under

legislative or municipal authority, without compensation to adjoining lot owners for injury to their property and its consequent diminuation of value."

The Hot Springs R. R. Co. v. *Williamson*, 136 U. S. 121 L. C. P., Book 34, p. 355.

CONCLUSION.

In conclusion, we say that Zimmerman should prevail in this matter. His land was taken; he pursued a course declared by the Supreme Court of his State to be an appropriate remedy in seeking redress; a judgment was rendered in his behalf; the defendant company is the successor in interest to the wrong-doing company; it continues to occupy the land, the taking of which gave rise to the judgment; its only claim to such land is by and through the wrong-doing company; Zimmerman must be granted this remedy, or the fundamental law must be violated; and the amount of his judgment should be held to be a finality, for to hold otherwise would be establishing a doctrine which might often result in such law's delay as would be equivalent to a denial of justice.

Respectfully submitted,

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